No. 10610

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,
Appellee.

Appellants' Reply Brief

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STATEMENT OF THE CASE

It is with some pleasure that Appellants find that Appellee admits that the statement of the case as set forth in Appellants' Opening Brief is substantially correct, for he had attempted to set out the facts without argument, coloring or distortion.

In reference to the two suggested corrections of Appellee, may we point out that the first concerns itself merely with an argument attempting to read into the ordinary opening words of any court, to-wit, "This is the time and place fixed for the hearing of Petition to Determine Value

of Debtors' real property. Are you ready to proceed? No negative answer was interposed." Tr. p. 46."
some guilty feeling of the Commissioner. We submit that such an argument is not persuasive and like the following point raised by the Appellee pertaining to the technical recital of the Commissioner that Wumkes appeared "personally and through his attorney, Russell Goodwin, Esq.," is a play upon words and does not have any bearing upon the merits of the case. May we sugest that the Commissioner's certificates and papers very clearly show his desire to recite all of the facts and to attempt to keep the sequence of events clearly before the court.

Now as to the suggested second correction to the effect that the Commissioner's certificate as to the hearing of May 18, 1943, stating that "No evidence to sustain allegations for Petition for Rehearing was introduced." We submit that the statement is correct for the record clearly shows that Wumkes was not personally present, that Russell Goodwin, former attorney for Wumkes, was present and testified. (Tr. 24). And may we point out that the affidavit of counsel for the Appellee on page 119 of the transcript states that he then presented an offer of purchase in the sum of $5,500.00, in writing, and the Commissioner refused to receive said offer. This was correct, and may we point out here that nowhere in Appellees' brief have they cited any authority or argued the admissibility of an offer of purchase and yet Appellants in their opening brief pointed out that numerous authorities clearly hold such offers to be inadmissible and improper. (Appellants' Opening Brief, pages 15, 16 and 17).

Again Appellee attempts to create an impression that is not sustained by the record, that he was ready then with

testimony bearing upon the issues and the Commissioner refused to hear the parties. I suggest we again examine the Affidavit of Mr. Nichols on p. 119 of the transcript. Other than the offer to buy. No statement is made therein that at the time he had offered any other evidence or testimony. Mr. Nichols does state that after the Petition for review was filed that he requested on several occasions of the Commissioner a statement or or accounting of the disbursement of funds received by the Commissioner but he does not state that he did so at the time of this hearing, and even if such a request had been made, it would not have been evidentiary. Thus clearly Appellee's statement is not correct nor is it borne out by the cited Affidavit.

Perhaps at this point it would be well to point out that at the hearing of May 18, 1943, the Commissioner had only the Petition for a Rehearing (Tr. 24); the testimony of Russell Goodwin concerning the mailing of his letters to Wumkes (Tr. 25); the rejected offer of purchase for a sum of $5,500.00 (Tr. 119); as evidence presented, and that the additional affidavits and offers referred to by Appellee in his brief were dated some four months later in September, 1943, and were not presented to the Commissioner but were presented when the matter was before the District Court.

Now as to the remaining facts which Appellee refers to as additional facts; may we suggest that nowhere is there any hint or charge that the Appellants are in contempt or have not lived up to the rent order of the Commissioner. No citation of authority is given that it is incumbent upon a Commissioner to render an accounting or statement; very clearly the Commissioner's books and records are open to the examination of the creditor and he can learn

the disposition of the entire income of the property and what rental, if any, is payable to him after the payment of the proper charges are made by the Commissioner in accordance with the law. Appellants submit that this point is immaterial and has no bearing upon the right of the Appellants to have the property appraised, nor is there anything in the record to show that the Commissioner did not take into consideration such rental, if there was any.

The second point Appellee suggests was overlooked is an argumentive one referring to a statement in the schedule by Petitioners that the property at that time, to-wit, 1940, was valued at $8,000.00. This value is usually and customarily merely an approximate estimate and certainly would have little evidentiary value as it was some three years prior to the date of the reappraisal hearing.

The third point is regarding the good crop year of 1941-1942. Clearly this was an exceptional year for it was three times greater than the preceding year or the second preceding year and the testimony clearly showed that the following year of 1943 instead of running 3,000 boxes that only 263 boxes plus approximately 305 boxes, or a total of 568 boxes were grown which would only be one-sixth of the bumper crop of 1941-1942.

The fourth point is the affidavit of K. C. O'Bryan presented to Judge Yankwich which again contains an offer of purchase which we have heretofore herein and in our opening statement shown to be improper and inadmissible.

ADMISSIONS IN APPELLANTS' BRIEF

First, referring to the hearing of May 18, 1943, we now find Appellee insisting that his Petition was not only

based upon the ground of mistake and excusable neglect but also on (1) irregularity in the proceeding or abuse of discretion; (2) Newly discovered evidence, material for the party making the application, whcih he could not with reasonable diligence have discovered and produced at the trial. However, nowhere does he answer or attempt to answer the law cited by Appellants in their opening brief that it must be a surprise to which a party is unexpectedly placed, to his injury, without any default or negligence of his own which ordinary prudence could not have guarded against (Appellants' Opening Brief, pp. 10, 11 and 12) and further that he must at the earliest practicable moment apply for such relief, as will produce the least vexation, expense, or delay, either by non-suit, a continuance, the introduction of other evidence or some other available mode. Such a party may not remain silent, taking his chances upon a favorable verdict and thereafter move for a new trial. (Appellants' Opening Brief, pp. 10 and 11 and citations therein.)

Secondly, if for purpose of argument we can assume that the Petition raises the point of new evidence, Appellee admits that he must prove that such new evidence could not with reasonable diligence have been discovered and produced at the trial. See Appellee's Brief, p. 12. Along this line may we call to the court's attention the case of Sun Life Ass'n. Company of Canada v. Budzinski 25 Fed. (2d) 77. Where the court said "The application does not show the testimony now recorded as newly discovered was not by proper diligence available at the trial and, therefore, the application fails to show that legal requisite for the allowance for such a motion." Then if Appellee intended to ask for a rehearing upon the existence of

new evidence it certainly was incumbent upon him to show the new evidence and the fact that it could not by reasonable diligence be presented at the trial court, and yet as we have herein before pointed out, the Petition was submitted to the Commissioner upon the Wumkes' Petition, the testimony of Russell Goodwin concerning his letters of notice to Dr. Wumkes and the rejected offer of purchase. This we feel did not constitute new evidence and certainly nothing was proven to show why such evidence could not have been presented at the trial.

We, therefore, respectfully contend that the very facts show that any accident or surprise suffered by the Appellee's counsel withdrawal from the case was the result of the Appellee's own dilatory and negligent actions in which after receiving notice of a Federal hearing Appellee ignored the matter, negligently failed to contact his attorney and then after the court granted two continuances to his attorney and after sitting throughout the case and waiting a month for the decision he then asked the court some seven weeks after the hearing to retry the matter. Certainly this case makes the language of the court in re ADVOCATE C.C.H. Bankruptcy Law Service, 54, 519, p. 5596, Appellee's Opening Brief, p. 11 applicable, to-wit:

"This is a motion where the delay of the..... is not only inexcusable but is one where the discretion of the court would be abused in granting it."

Now, referring to the three cases cited by Appellee pertaining to accident, surprise and neglect, and particularly found on Appellee's p. 15. Let us examine these cases. First, Adams v. Rathbun, 86 N.W. 629, is one where an attorney without knowledge or notice to his client hired another lawyer to take the case and withdrew himself. The

other lawyer at the commencement of the trial asked for a continuance but the court denied it and later the Appellate granted a new trial. There was no negligence or dilatory actions in this case, they asked promptly for the relief and the continuance was denied. In the case at bar, after two continuances granted and other dilatory actions, the Commissioner eventually went ahead and heard the matter.

The second case, Simpkins v. Simpkins, 36 Pac. 759, was a divorce case; the wife living 1200 miles away was served. Her attorney there contacted local counsel who filed a Demurrer, prepared an Answer and suggested a settlement, said local counsel later refused to file the Answer, demanding that his client settle the case, the Demurrer was overruled and twenty-four hours given to answer and default entered. Wires and letters showed the refusal of the attorney to act but there was no negligence on the part of the defendant. Clearly this case is not like the one at bar for here the attorney for Wumkes wrote numerous letters to his client. The letters were returned, telephone calls were of no avail, Wumkes had negligently left the city, left the County, leaving no address for his attorney. His attorney obtained two continuances, however, Wumkes knew of the hearing for he had contacted the Los Angeles Commissioner and notice had been sent to him but he did not contact his counsel at any time but on the day of the hearing he appeared expecting his counsel to be ready, then permitted his counsel to withdraw and permitted the case to proceed without objecting or asking any delay. He then waited a month for the trial court to enter its decision and seven weeks after the hearing asked for relief. Again, we say, that any accident or surprise was caused solely by his own negligence and dilatory action.

Now the third case, People v. Schulman, 132 N.E. 535 is a criminal one where the attorney was not versed in the rights of the defendant and the crime being an indecent liberty case concerning children was not proven to the court's satisfaction. Clearly this case by its very nature being criminal can not be a guide or authority in the case here presented.

Now referring to the District Court's reversal of the Order of April 9th. Appellee suggests that the Commissioner did not look or ignored certain points which points were merely evidentiary and laid within the discretion of the Commissioner to weigh and determine in arriving at his decision.

Secondly, Appellee suggests that the District Court had additional evidence submitted. Clearly the original sale price to the Powells by Wumkes had little evidentiary value and was known by the Commission, the payment of rental was all within the Commissioner's knowledge, so that the only remaining new evidence was merely cumulative, being testimony of estimates of value. If such cumulative evidence will warrant a new trial or a reversal where is there any finality in these matters? Certainly such evidence was clearly available to the Appellee with the exercise of reasonable diligence at the original hearing.

Again, we recall the language of Rait v. Federal Land Bank, 135 Fed. (2d) 447 "That a value duly fixed after a hearing by the Commissioner should not lightly be disturbed, and the District Court ought to proceed with a sound and conscientious restraint, before overturning it on review" and the language of the Carmody case, 131 Fed. (2d) 318," that the law does not contemplate that a finding of the Conciliation Commissioner shall be set aside by a

district judge on a mere difference in personal judgment as to the crediting of the record evidence."

Therefore, in conclusion, may we submit that no party can be so lax and dilatory and yet expect the court to aid him and grant a rehearing in the case. That further, the findings of the Commissioner as to the value of the property were proper and substantiated by the evidence and should be upheld by the Honorable Court.

Respectfully submitted,

H. R. GRIFFIN,
Attorney for Appellants.